

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Mr. Abdulhamit Gül
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Re: International law obligations to release lawyer Eren Keskin

Dear Mr. Gül,

We write on behalf of Lawyers' Rights Watch Canada (LRWC), a committee of lawyers and human rights defenders who promote international human rights, the independence and security of human rights defenders, the integrity of legal systems and the rule of law through advocacy, education and legal research. LRWC has Special Consultative Status with the Economic and Social Council of the United Nations.

LRWC has written in the past with respect to various Turkish lawyers and human rights defenders who have been detained, arrested, charged, and/or imprisoned in violation of Turkey's international human rights law obligations and Turkey's own Constitution. Communications to the Government of Turkey have been made by LRWC regarding the cases of: Selçuk Kozağaçlı, Şebnem Korur Fincancı, Ramazan Demir, Erin Keskin, Mustafa Aydın, Can Tombul, Taner Kilic and numerous other Turkish lawyers. LRWC has also made oral and written statements to the UN Human Rights Council and submissions to the UN Human Rights Council and Special Procedures regarding widespread persecution of lawyers, journalists and other human rights defenders through wrongful prosecutions and convictions, arbitrary detention and other grave rights violations.

We have previously written to you regarding Turkish lawyer Eren Keskin, most recently on 5 April 2019. Ms Keskin has been the target of an ongoing campaign of political and judicial harassment, having been charged and convicted on multiple occasions with respect to alleged crimes that would not be considered crimes in any country governed by the rule of law. We understand that Ms. Keskin was most recently sentenced (on 21 May 2019) to a term of imprisonment of 3 years and 9 months in relation to charges of "propaganda on behalf of a terrorist organization" under Article 7(2) of the Anti-Terrorism Law.

LRWC is once again gravely concerned regarding the continuing and unjust persecution of lawyer Eren Keskin. The criminal charges are illegitimate and unfounded. This prison sentence, combined with prior and pending charges, could subject Ms. Keskin to an extremely lengthy prison term that effectively could see Ms. Keskin die in prison.

Background of Ms. Keskin

Ms. Keskin, 59 years of age, is a lawyer and vice-president of the Human Rights Association in Turkey (İHD) and the co-founder of the Legal Aid For Women Who Were Raped Or Otherwise Sexually Abused by National Security Forces. She has been a strong advocate for fundamental rights and freedoms in

Turkey, especially for the Kurds, women and the LGBTQ community. As a human rights advocate for almost thirty years, Ms Keskin has contributed to the protection of minority rights, countered violence against women, campaigned to end torture, and challenged militarism.

Ms. Keskin is an internationally recognized human rights defender. She is an honorary member of the Paris Bar Council, and the winner of multiple international awards for her peace and human rights work namely: the 2004 Aachen Peace Award "for her courageous efforts and activities for human rights"; the 2005 Theodor Haecker Prize for Civic Courage and Political Integrity; and the 2018 Helsinki Civil Society Award.

In support of the right to freedom of expression and a symbolic gesture of support to the imprisoned editorial staff, from 2013 to 2016 Ms. Keskin held the title of 'editor-in-chief' for *Özgür Gündem*, one of the few independent newspapers in Turkey critical of the government and known for its extensive reporting on the Kurdish-Turkish conflict. Due to her title as 'editor-in-chief' at *Özgür Gündem*, over 120 cases have been lodged against her in Turkish courts.

The Charges, Convictions, and Ongoing Persecution of Ms. Keskin

In retaliation for her human rights activities, Ms. Keskin has been subject to multiple instances of persecution and harassment, including assassination attempts, and subjected to prosecutions based on overly broad charges that offend the legal principle of certainty and preclude both advance notice and defense. Ms. Keskin was sentenced and imprisoned for 6 months in 1995 for using the word *Kurdistan*. In 2014, she was sentenced to ten months in prison under article 301 for insult to the state for having said "Turkey has a dirty history".

In a further 69 cases, Ms. Keskin has been pronounced guilty but the cases remain under review before the Court of Appeals or the Supreme Court. Unless the decisions of the courts of first instance are reversed, a cumulative sentence of 12.5 years and fines of approximately € 93,000 (TL 460,000) may be imposed on Ms. Keskin, in relation to following illegitimate (e.g., overly broad and vague) charges:

1. 'spreading propaganda for an armed terrorist organization' (Law on Fight against Terrorism No. 3713, Article 7(2)),
2. 'denigrating the Turkish nation, the Republic of Turkey, institutions and organs of the State' (Turkish Penal Code, Article 301),
3. 'insulting the President' (Turkish Criminal Code, Article 299), 'failure to publish article corrections in the newspaper' (Press Law, Article 18),
4. 'revealing the identity of the accused' (Press Law, Article 21(c)), and 'insult' (Turkish Penal Code, Article 125).

As of December 2018 there were still 47 cases against Ms. Keskin awaiting verdicts.

Ms. Keskin has been criminally charged for news and articles by other authors exercising their right to freedom of expression. According to the Turkish Press Law, editors-in-chief can be indicted for publications in cases when the responsible authors cannot be held to account. Six of these cases have resulted in convictions with all appeal options exhausted. These convictions were for 'insulting the President' and for 'failure to publish article corrections in the newspaper'. Fines of nearly €14,500 (TL 72,000) have been imposed on Ms. Keskin. Failure to pay the outstanding monetary fines would result in approximately 8.5 years of imprisonment.

Court sessions in trials related to her title as the 'editor-in-chief' of *Özgür Gündem* were held in May 3 and 7, 2018. Ms. Keskin is one of the nine defendants, including advisory board members, journalists and the editorial director of *Özgür Gündem*, in another ongoing prosecution, which includes charges under the Penal Code of "disrupting the unity and integrity of the State" under Article 302, "establishing an organisation for the purpose of committing crime" under Article 220 and "being a member of an armed organisation" under Article 314. The charges could result in a sentence of up to 24 years in prison. The

UN Working Group on Arbitrary Detention (WGAD) has characterized the principle of legality as “a cardinal principle of international human rights law”¹ and of “modern criminal law”² that is “required by the rule of law.”³ It is a fundamental guarantee of due process in criminal proceedings.⁴

We have been informed that the 12th hearing of the trial, where *Özgür Gündem*'s daily's administrators and staff face charges for “making propaganda for a terrorist organisation”⁵, resumed at the İstanbul 14th High Criminal Court on March 28, 2019.

Legal Analysis

1. Legality and Vagueness

The above noted charges against Eren Keskin violate the above-described international criminal law principle of legality.⁶ No crime or punishment can exist without a legal ground.⁷ The principle of legality ensures that a person must be discharged if there is no law that codifies the offense, there is a silence on the offence or there is a lack of law on the offence.⁸ The principle of legality is a general principle of international law,⁹ to which Turkey is bound in accordance with the above-referenced covenants and conventions.

Neither the Penal Code in Turkey nor the *Law on Fight against Terrorism* define what constitutes an armed terrorist organization or the criteria for what constitutes membership and, absent any definition, it therefore can be, and has been, arbitrarily used to criminalize a wide range of legal activities including the exercise of internationally protected rights. This law is illegitimate by any international standard.

In a 2017 opinion concerning Turkey, the WGAD found that the investigation and prosecution of 10 individuals associated with the Turkish daily newspaper *Cumhuriyet*, under anti-terrorist law, Act No. 3713, for “aiding terrorist organizations, in accordance with the organizational aims of these organizations, without being a member”, violated the principle of legality due to the vagueness of the provision.¹⁰ The Working Group warned that

Vaguely and broadly worded laws have a chilling effect on the exercise of the right to freedom of expression with its potentials for abuse as they violate the principle of legality as codified in article 11 (2) of the Universal Declaration of Human Rights and [ICCPR] article 15 (1)....

[and that] anti-terrorism laws ‘by using an extremely vague and broad definition of terrorism, bring within their fold the innocent and the suspect alike and thereby increase the risk of

¹ WGAD, Opinion No 61/2016 (Saudi Arabia), UNHRCOR, 77th Sess, UN Doc A/HRC/WGAD/2016/61 (2016) at para 49.

² WGAD, Opinion No 27/2011 (Bolivarian Republic of Venezuela), UNHRCOR, 61st Sess, UN Doc A/HRC/WGAD/2011/27 (2011) at para 38.

³ WGAD, Opinion No 32/2016 (New Zealand), UNHRCOR, 76th Sess, UN Doc A/HRC/WGAD/2016/32 (2016) at para 62.

⁴ WGAD, Opinion No 10/2018 (Saudi Arabia), UNHRCOR, 81st Sess, UN Doc A/HRC/WGAD/2018/10 (2018) at para 50.

⁵ Article 7 of the Law on Fight Against Terrorism of Turkey, Act. No. 3713

⁶ Crisan, Iulia, “The Principle of Legality “*Nullum crimen, nulla poena sine lege*” and Their Role” in Effectus Newsletter, Issue 5 (2010); Olasolo, Hector, “A Note on the Evolution of the Principle of Legality in International Criminal Law” in Criminal Law Forum 18:301-319 (2007)

⁷ Lincoln, Jennifer, “*Nullum Crimen Sine Lege* in International Criminal Tribunal Jurisprudence: the problem of the residual category of crime,” 7 Eyes on the ICC 137 2010-2011

⁸ Ja'far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

⁹ Sekuloski, Dr. Branko, “International Criminal Court,” in European Scientific Journal vol.9, no. 28 (2013)

¹⁰ HRC, Working Group on Arbitrary Detention, Opinion No. 41/2017 concerning 10 individuals associated with the newspaper *Cumhuriyet* (Turkey), 26 July 2017, A/HRC/WGAD/2017/41, para. 101.

arbitrary detention’ with the consequence that ‘[l]egitimate democratic opposition, as distinct from violent opposition, becomes a victim in the application of such laws’.¹¹

As stated in our 8 May 2018 correspondence regarding Ms. Keskin, Article 314(2) the Turkish Penal Code has been used by Turkey to arbitrarily arrest, detain, and convict lawyers acting for clients or causes unpopular with the authorities or otherwise seen as government critics. The vague formulation and broad interpretation of the law by the Turkish prosecutors and courts puts all lawyers and other human rights defenders at risk of arbitrary detention. Targeting of lawyers and others has become common since the attempted coup on July 2016. In March 2019, 18 lawyers were sentenced to a total of 160 years in prison by Istanbul 37th Assize Court under Article 314 of the Penal Code. The Arrested Lawyers Initiative reports that between July 2016 and 5 June 2019, 1,546 lawyers have been prosecuted, 599 have been arrested, and in some cases subjected to torture and ill-treatment and 311 sentenced to a total of 1967 years in prison.

2. Certainty and Notice

The principle of legality includes the requirement of certainty (*nullum crimen sine lege*), that a person can only be held criminally responsible for an act that has already been determined in law to be a crime and for which already there exists a penalty. A person must be able to know in advance what is unlawful so that s/he can inform their actions. The concept of *nullum crimen sine lege* overlaps with the principle of notice. A person cannot be convicted for acts against which there are no enforceable laws¹² (and thus no capability of having notice of what is unlawful.) Where ambiguity exists in the definition of an offense, it must be interpreted in the interest of the defendant.¹³ The European Court of Human Rights (ECtHR) applies an “accessibility and foreseeability” test; in order for an offence to be knowable to an offender, the provisions must be both “foreseeable” and “accessible.”¹⁴ See the *Kononov* case,¹⁵ the *Lubanga* case¹⁶ and the *Vasiljevic* case.¹⁷

The principle of legality has its basis in customary international law¹⁸ and has been codified in many international instruments, including the:

- Universal Declaration of Human Rights (UDHR) (1948), Article 11(2)¹⁹
- International Covenant on Civil and Political Rights (ICCPR) (1966), Article 15
- European Convention on Human Rights and Fundamental Freedoms (ECHR) (1950), Article 7
- Rome Statute of the International Criminal Court, Article 22²⁰
- Erdemovic case,²¹

¹¹ HRC, Working Group on Arbitrary Detention, Opinion No. 41/2017 concerning 10 individuals associated with the newspaper *Cumhuriyet* (Turkey), 26 July 2017, A/HRC/WGAD/2017/41, paras. 98-99. See also, HRC Working Group on Arbitrary Detention, Opinion No. 20/2017 concerning Musallam Mohamed Hamad al-Barrak (Kuwait), 19-28 April 2017, A/HRC/WGAD/2017/20, paras. 50-51.

¹² Ja’far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

¹³ Sekuloski, Dr. Branko, “International Criminal Court,” in *European Scientific Journal* vol.9, no. 28 (2013)

¹⁴ Wilt, Harmen van der, “Nullum Crimen and the International Criminal Law: The Relevance of the Foreseeability Test” in *Nordic Journal of International Law* 84 (2015) 515-531

¹⁵ *Kononov v. Latvia*, 24 July 2007, ECtHR, no. 36376/04, 9 *ehrc*, Vol. 11, 129.

¹⁶ *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of Charges’, 29 January 2007, icc, no. icc-01/04-01/06.

¹⁷ *Prosecutor v Vasiljevic*, 29 November 2002, iccy Trial Chamber (tc), no. it-98-32-T.

¹⁸ Wharton, Sara, “The Evolution of International Criminal Law: Prosecuting “New” Crimes Before the Special Court for Sierra Leone” in *International Criminal Law Review* 11 (2011) 217-239

¹⁹ UDHR, Article 11: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”¹⁹

²⁰ Sekuloski, Dr. Branko, “International Criminal Court,” in *European Scientific Journal* vol.9, no. 28 (2013); Olasolo, Hector, “A Note on the Evolution of the Principle of Legality in International Criminal Law” in *Criminal Law Forum* 18:301-319 (2007)

²¹ *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996)

- Delalic case²²

Given the vague and overly broad nature of the specific charges that are the subject of this letter, including the crime of “making propaganda on behalf of a terrorist organization” under Article 7 (2) of the Anti-Terrorism Law, the most recent sentencing of Ms. Keskin violates the principles of certainty and notice, because the anti-terrorism law itself is unenforceable under international law. It should be noted that Turkey is a State Party to the ICCPR and the ECHR and is therefore bound to ensure freedom from punishment for criminal charges that do not strictly comply with the principle of legality. These treaties also impose on Turkey the duty to ensure effective remedies for violation of guaranteed rights. Further, Turkey, as a member of the UN, has accepted the terms of the UDHR.

Turkey is obliged to ensure for Eren Keskin and others freedom from prosecution for charges that fail to comply with international requirements of certainty and legality and contravene the requirement under the ICCPR of notice. Detention based on such charges is arbitrary and unlawful.

3. The Role of Lawyers

LRWC urges you to comply with Turkey’s obligations under international human rights laws, including the United Nations’ (UN) *Basic Principles on the Role of Lawyers*.

Article 16 of the *Basic Principles on the Role of Lawyers* states:

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economics or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

Article 18 states:

Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

Article 23 provides:

Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization.

It appears that Ms. Keskin has been charged with “making propaganda on behalf of a terrorist organization” under Article 7 (2) as a consequence of her advocacy, in her role as a lawyer, on behalf of persons accused of being connected with a terrorist organization.

Every person, including those accused of terrorism-related charges, is entitled under both international law and Turkey’s Constitution, to be represented by a lawyer in his or her defence. Charging lawyers such as Ms. Keskin under Article 7(2) can only be designed to deprive such accused persons of their constitutional right to a legal defence in Turkey’s judicial system. It is your obligation to uphold the independence of Turkey’s judicial system, which independence is also enshrined in Turkey’s constitution.

4. Unlawful Arrest and Detention

Furthermore, as a party to the ICCPR²³, the *Optional Protocol to the International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*

²² Prosectuor v Delalic, Case No. IT-96-21-T, Judgment 1209-12 (Nov. 16,1998)

(CERD) and the ECHR,²⁴ Turkey is legally obligated to ensure that individuals within its territory enjoy, without discrimination, rights to: the presumption of innocence, freedom from arbitrary arrest or detention, pre-trial release, to trial within a reasonable time, determination of charges and rights by an independent court and the right to obtain a remedy in relation to any rights violation(s). As Turkey is a member of the Council of Europe, the relevant recommendations of the Committee of Ministers on pre-trial detention and release also apply.

Arrests and detentions by Turkish authorities must comply strictly with the requirements of the ICCPR and the ECHR. The European Court of Human Rights (ECtHR) has held in relation to the lawfulness of arrest and detention, that “lawful” and “in accordance with a procedure prescribed by law” in Article 5(1) of the ECHR requires,

not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and not arbitrary... In addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of “lawfulness” set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...²⁵

Similarly, the UN Human Rights Committee (HR Committee) has clarified that “remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances”²⁶ and that “[p]re-trial detention should be an exception and as short as possible”²⁷ and must be lawful, reasonable and necessary in all the circumstances, “for example, to prevent flight, interference with evidence or the recurrence of crime”.²⁸ The HR Committee affirmed that pre-trial detention should remain the exception and that bail should be granted, “... except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party” and there is no means other than detention to address the established risk(s). The mere assumption by a State party that the author would interfere with the investigations or abscond if released on bail does not justify detention or an exception to the rule in article 9, paragraph 3, of the Covenant.²⁹

5. Freedom of Expression

Two of the earlier convictions of Ms. Keskin as described above, i.e., being sentenced and imprisoned for 6 months in 1995 for using the word *Kurdistan* and being sentenced to ten months in prison under article 301 for insult to the state, are also based on illegitimate laws. Freedom of expression is an individual right of all Turkish citizens, guaranteed by the international treaties, conventions and covenants described above, as well as enshrined in Turkey’s Constitution, Article 26, which states:

Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities.

²³ International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force 23 March 1976, online at: <http://www2.ohchr.org/english/law/ccpr.htm>.

²⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force 3 September 1953, online at: <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CM=7&DF=24/07/2012&CL=ENG>.

²⁵ *Steel and Others v. the United Kingdom* (App. No. 67/1997/851/1058), judgment of 23 September 1998, Reports 1998-VII, p. 2735, at para. 54

²⁶ Human Rights Committee, *Mikhail Marinich v Belarus*, Communication No. 1502/2006, para. 10.4;

²⁷ CCPR General Comment No. 8, supra note 31, at para. 3.

²⁸ Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, at para. 9.8

²⁹ Communication No. 1178/2003, *Aleksander Smantser v. Belarus*, at para. 10.3

To the extent Turkey's Penal Code purports to criminalize the above-cited statements attributed to Ms. Keskin, the Penal Code is in violation of Turkey's Constitution, which is the supreme law of Turkey.

Conclusion

LRWC urges the Government of Turkey to:

- a. immediately and unconditionally release Ms. Keskin;
- b. immediately and unconditionally withdraw all charges against Ms. Keskin;
- c. immediately vacate all convictions of Ms. Keskin and the sentences imposed;
- d. put an end to all acts of harassment against Ms. Keskin;
- e. ensure that all lawyers, journalists and other human rights defenders in Turkey can carry out their professional duties and activities without fear of reprisals, physical violence or other human rights violations; and
- f. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments, including the ICCPR and the ECHR.

Thank you for your prompt attention to this important matter.

All of which is respectfully submitted:



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